90-885

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

KULDIP SINGH MUNDI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

THIS COURT SHOULD REVIEW THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS WHICH HELD THAT A PARTICULAR BREACH OF CONTRACT WAS WIRE FRAUD. THE LOWER COURT'S DECISION ALSO CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS.

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *United States v. Mundi,* 892 F.2d. 817 (9th Cir. 1990) and is attached as Appendix A.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on December 21, 1989. Appellant's Petition for Rehearing was denied on March, 1990. The order denying rehearing is attached as Appendix B. Appellee's Petition for Rehearing was denied on September 5, 1990. The order denying rehearing is attached as Appendix C. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 18 U.S.C. § 1343 states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. 18 U.S.C.A. § 1343 (1984) (amended 1989).

Federal Rule of Criminal Procedure 29(a) states:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right. Fed. R. Crim. P. 29(a).

STATEMENT OF THE CASE

This case involves a breach of contract which the lower court believes constitutes wire fraud. Petitioner participated in the exchange of legally purchased airline tickets for tickets on other airlines. According to the airlines and their representatives, this exchange constitutes not only a breach of contract but also criminal fraud.[1]

International airlines belong to the international airlines transport association (IATA) while domestic carriers belong to airline reporting corporation (ARC). Airlines which provide both domestic and foreign travel belong to both IATA and ARC. The airlines and travel agencies are connected by contractual agreement through IATA and ARC. R-(288-289),(249-251). All of the tickets in the case before the court were IATA tickets exchanged for either other IATA tickets or ARC tickets. R-(259-260).

Although a passenger may exchange an individual ticket, airlines contractually restrict the bulk exchange of airline tickets for travel originating in countries such as Nigeria where there are currency restrictions. R-250. The government's brief in the lower court accurately stated that although IATA and ARC regulations do not prohibit ticket exchanges, "a travel agency which exchanges the Nigerian tickets for ARC tickets violates the ARC contractual obligations in doing so when it fails to obtain the approval of the exchange from the airlines involved. (Gov. Exh. 28)." Brief for Appellee at 7.

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[1] Mundi was found guilty after trial by jury on May 28, 1987. On direct appeal pursuant to 28 U.S.C. § 1291, the Ninth Circuit Court of Appeals reversed the conviction and seven year sentence for interstate transportation of stolen goods and affirmed 26 concurrent five year sentences for wire fraud.

All IATA tickets are marked non-transferrable. R-283. Airlines require approval to exchange a ticket since they are losing a sale. R-(284-286),487,514. As a practical matter the non-transferrable nature of these tickets is more frequently ignored than enforced, as the court itself observed. R-286. In an effort to prohibit the exchange of tickets for travel originating in Nigeria, despite selling a greater number of tickets than available seating, airlines and travel agents have put restrictive wording on tickets that require airline approval prior to an exchange. R-229. The propriety of these contractual restrictions has been challenged by some travel agencies who provide passengers with "legal notice" that an airline cannot stop a passenger who receives an exchanged ticket. R-263. IATA's handbook, which serves as the contractual agreement between travel agent and airlines, does not mention the problem of exchanges for tickets originating in currency controlled countries. R-254. It does not mention that the Nigerian government will refuse to honor tickets that attempt to violate its currency exchange regulations. R-256.

It is undisputed that citizens in Nigeria paid full value for the tickets purchased in Nigeria. R-(260-263). Nigerian citizens purchase and the airlines and travel agents knowingly sell, a greater number of tickets than available seating on flights leaving Nigeria. Although IATA has made a recommendation that the industry monitor the number of tickets it is selling so that there is some correlation to the available seats on aircraft leaving Nigeria, this is merely a recommendation. Travel agents and the airlines, both members of IATA, continue to knowingly sell many more tickets than available seats. R-(270-271).

These tickets are used to move money out of Nigeria and avoid currency restrictions in that country. R-

232. The Nigerian purchased tickets are sold to travel agents outside Nigeria at a discount to obtain hard currency. R-233. Travel agents then exchange the Nigerian tickets for tickets on other airlines. R-241. Ultimately the airlines providing passage are to be credited by the airline which sold the original Nigerian ticket, which has its account debited by IATA or ARC. R-241. The exchange of tickets with corresponding credits and debits are commonplace in the airline industry, airlines find it undesirable to receive payments in Nigeria. R-245. Although the airlines ultimately receive full payment in these countries, the government restrictions on the transfer of the currency are undesirable. If the volume of tickets sold for travel from Nigeria has some reasonable relationship to the actual number of flights there is no problem with payment. R-270,282. The Nigerian government will hold up payments in Nigeria if it believes that there is an intent to violate the country's currency laws. R-243,266,278.

An IATA representative testified at trial that although he did not know of instances where airlines had been unable to get the currency out of Nigeria, R-245, the government cannot afford to pay airlines promptly because the balance of payments owed the airline industry is in the millions of dollars. R-245. The country of Nigeria has fallen behind in paying its debt and devalued its currency. R-(605-608),611. Nigeria claims it will honor its debt but is negotiating to postpone repayment. R-(611-615). Thus, although the airline that has provided passage receives full value in Nigeria, R-(266-267), the delay in payments is undesirable to the carriers. R-268.

In the case before this Court the petitioner entered into an agreement with the owner of another travel agency to exchange tickets. R-(420-421). The petitioner explained that once IATA and ARC realized that tickets

were being exchanged without airline permission, the agencies would lose their licenses. R-1116. The petitioner had a conversation with an agent of ARC and explained that he had exchanged Nigerian tickets in the past but only after checking with an attorney who advised him that it was legal. R-973. The ARC agent informed the petitioner that the exchanges were improper and that the airlines were losing money. R-974.

ARC regulations differ in some respects with those of IATA. The ARC handbook requires that a ticket cannot be exchanged without the authority of the carrier whose tickets are being issued. R-292. ARC regulations require weekly sales reports which reflect the sale or exchange of tickets on a weekly basis. R-301. The IATA reporting period is biweekly. In the case before the court it was not petitioner's obligation to file these reports. Although there is no similar IATA requirement, ARC exchanges which involve miscellaneous charge orders (MCO) as a means to effect the exchange require approval prior to any exchange over $5,000. R-307. In the case before this Court no approval was received prior to the exchanges that involved MCO's and ARC tickets. The exchanges in the case before this Court were of a Nigerian purchased airline ticket, an IATA carrier, through an MCO over to an ARC carrier. R-308. This manner of exchange violates ARC and IATA regulations because the tickets are marked "non-refundable", "non-transferrable" or "not valid unless travel commences in Nigeria". R-243,266,278.

The government also admitted evidence of a similar modus operandi conducted at the Marco Polo Travel Agency in Miami, Florida. Petitioner arranged for the delivery of Nigerian tickets which were used for an exchange. R-434. Petitioner told codefendants that the airlines received payment but that there was a three

month delay. R-810. Petitioner knew that ARC rules required airline approval prior to exchanges and that the airlines would refuse these bulk exchanges. R-(768-769),931,936,941. After his federal trial, petitioner was prosecuted for this exchange by the State of Florida. The trial court dismissed the charges because the state could not plead a prima facie case of fraud. The Third District Court of Appeal held that the exchange of airline tickets was not a crime. *State v. Mundi,* 558 So.2d 503 (Fla. 3d DCA 1990). *See also, Singh v. State,* 545 So.2d 517 (Fla. 3d DCA 1989)(contains lengthy discussion of issue and cited as authority in *Mundi*).

Airline officials testified at trial that losses were incurred as a result of these exchanges. In April 1987 TWA was owed $26,500 by other airlines for tickets for an exchange by Marco Polo Travel in Miami Beach, Florida. R-487. SAS Airlines advised TWA that it would not honor claims for payment of TWA tickets which were issued in exchange for Nigerian tickets or MCO's in excess of $5,000 issued on Nigerian tickets. R-495. Other airlines operating in Nigeria took the same position. R-496. The procedure for resolving these disputes amongst airlines may take nine months or more. R-497. Pan American Airlines has accepted ten percent (in a hard currency) of the amount they billed in settlement of their claims against other Nigerian carriers resulting from ticket exchanges. R-(545-548),(552-553). The remainder of the money is still possessed by Pan Am in Nigeria. R-(554-575). When Pan Am billed TWA for the exchange tickets the claim was initially rejected. Ultimately TWA paid Pan Am $746,000 and Pan Am wrote off the remaining $353,000 which is still possessed by the airlines but in Nigeria.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD REVIEW THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS WHICH HELD THAT A PARTICULAR BREACH OF CONTRACT WAS WIRE FRAUD. THE LOWER COURT'S DECISION ALSO CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS.

Petitioner is asking this Court to grant a writ of certiorari to resolve the question of when the intentional breach of a contract becomes criminal fraud. The lower court held that a fraud was perpetrated because petitioner intended to violate contractual rules and also advised a travel agency employee to leave the country after violation of these rules.

It is axiomatic that every breach of a contract is not fraud. *E.g., McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir. 1990). A fraud "scheme is to be measured by a non-technical standard; the measure of fraud is its departure from moral uprightness, fundamental honesty, fair play and candid dealings in the general life of members of society." *United States v. Kreimer*, 609 F.2d 126,128 (5th Cir. 1980). For example, the mere "fact that parties take different positions under a contract in which a defendant charged too high a "prime rate" and thereby concealed or refused to disclose what the plaintiff considers to be the true prime rate called for in the contract, does not give rise to a valid claim for fraud." *Blount Financial Serv. v. Walter E. Heller and Company*, 819 F.2d 151,152 (6th Cir. 1987). The element of fraud in both wire or mail fraud involves the taking of property "by calculated misstatement or perversion of truth, trickery,

or other deception."[2] *McEvoy*, 904 F.2d at 792.

The government in the case before this Court cannot argue that petitioner participated in a scheme in which something of value was obtained by "false or fraudulent pretenses, representations or promises." 18 U.S.C. § 1343. The airlines were willing participants in petitioner's breach of contract because they knowingly sold a greater number of tickets than there was available seating on flights leaving Nigeria. The airlines also knew that Nigerians used these tickets as a means to avoid currency restrictions. From the perspective of "fundamental honesty, fair play and candid dealings", *Kreimer*, 609 F.2d at 128, or "perversion of truth, trickery, or other deception", *McEvoy*, 904 F.2d at 792, the airlines cannot be heard to complain about the subsequent breach of contract when these tickets are exchanged.

There was also no fraud even if the exchange of tickets, contrary to the contractual rules of IATA and ARC, was a breach of a fiduciary obligation. It is well settled that a breach of fiduciary duty alone does not constitute fraud. *United States v. Mandel*, 592 F.2d 1347,1362 (4th Cir. 1979); *Greenleaf v. United States*, 692 F.2d 182,188 (1st Cir. 1982). In *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500 (9th Cir. 1986) a law firm was found not to have committed fraud, although the attorneys failed to divulge errors and omissions because of a conflict of interest, because the parties were aware of the conflicting interests. The errors and omissions did not have "any causal impact" because there "was no reliance by" the other party. *Id.* at 505. *Id.* This is similar to the case before this Court. IATA, ARC and the airlines knew

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[2] The fraud element of wire and mail fraud is to be interpreted in the same manner. Hofstetter v. Fletcher, 905 F.2d 987 (5th Cir. 1988).

that airlines and travel agents were selling a greater number of tickets than available seating with knowledge that these tickets were being used as a means to avoid currency restrictions. Therefore there can be no reliance and no fraud. To hold otherwise would create an unjustified windfall for the airlines. The airlines reap the benefit of selling tickets with knowledge that there will be an exchange and then have their customers or their assigns incarcerated for fraud when they seek to exchange these tickets for something of value.

Evidence subsequent to the exchange such as advice to leave the country or mailing sales reports from different cities to slow down the potential closing of a travel agency does not prove fraudulent conduct. Instead it but merely shows that petitioner knew that IATA and ARC would regard the exchange as a breach of contract. *See MGIC. Cf., United States v. Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974)(mailing of sales invoices by motels to the bank and credit card owner not sufficiently related to scheme to constitute fraud).

In *McEvoy,* the case most similar to the case before this Court, the court came to a conclusion which conflicts with the lower court's ruling. *McEvoy* held that the submission of a phony contract to obtain IATA and ATC[3] approval of a contract between two travel agencies was not fraudulent, even if illegal kickbacks and other acts were part of but not provided for in the contract submitted to IATA and ATC. This was not fraudulent because IATA and ATC, which approved the new contract, "were not deprived of any property interest, but at most were deprived of their intangible interest, as regulators, and being able to regulate the airline industry properly." *Id.* at

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[3] The ARC was formerly called the Air Traffic Conference (ATC).

792.[4] Any loss suffered by McEvoy as a result of a deceptively approved contract by IATA and ATC was not created by deceiving McEvoy but rather by deceiving IATA and ATC.

> We do not believe, however, that the deceptive submission of the phoney contract to the two associations, so that Heritage would be allowed to serve as Norton's agent, was a scheme to defraud McEvoy within the meaning of the mail and wire fraud statutes. To be sure, the object of the submission may have been to "deceive the regulatory associations into approving" the Norton-Heritage contract. This may have been part of a general plan having has its object the transfer of Norton's business to Heritage, leaving McEvoy bereft of its major client. But securing the regulatory associations' approval by devious means (thus permitting Heritage to serve Norton) did not mislead, trick or deceive McEvoy so as to defraud it. What appellees did to McEvoy was not to deceive it but to break off what McEvoy claims was a binding contract. *Id.* at 793.

Similarly in the case before this Court there was no deprivation of a property right because, as in *McEvoy*, the lack of IATA and ARC approval for an exchange merely deprived these agencies of their ability to regulate the contractual relationship between airlines. It did not deceive the airlines.

McEvoy also held that illegal rebates and kickbacks

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[4] Pursuant to McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed. 2d 292 (1987) to come within the mail fraud statute the scheme to defraud must be intended to deprive another of money or property.

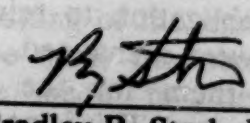
did not constitute fraud because these payments did not induce McEvoy to change its position. McEvoy's claim of loss emanates from the new and illegal contract between two other travel agencies. Similarly in the case before this Court, the exchange of tickets did not change the position of the airlines which provided passage and later received payments in Nigeria. The initial airlines which sold the tickets in Nigeria, with at least constructive knowledge that they would be used for currency exchanges, had a contractual obligation to reimburse other airlines when their tickets were exchanged. These airlines are willing to compensate them for the passage provided only in Nigerian currency. This is not related to any deception on petitioner's part but rather to the different positions these airlines take regarding their contractual obligations. Thus just as in *McEvoy* the plaintiff could not complain that an illegal rebate and kickback scheme between two other travel agencies effectively terminated McEvoy's contract, similarly airlines providing passage in return for tickets sold in Nigeria cannot claim to be the victim of fraud since their position was not changed by anything petitioner did or failed to do. Instead these airlines should insist on reimbursement from the airline that sold the Nigerian ticket in some currency that is not restricted.

The lower court's ruling not only conflicts with the ruling in *McEvoy* but also conflicts with the ruling of a Florida appellate court. Petitioner was prosecuted in the State of Florida for the same conduct that was admitted as evidence in the case before this Court. The trial court dismissed these charges and the appellate court affirmed the dismissal. *State v. Mundi,* 558 So.2d 503 (Fla. 3d DCA 1990). This decision was predicated upon an earlier Florida appellate decision holding that the identical conduct does not amount to a criminal fraud. *Singh v. State,* 545 So.2d 517 (Fla. 3d DCA 1989).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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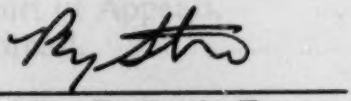
CERTIFICATE OF SERVICE

I certify that three copies of the above were served by United States mail, first-class postage prepaid, upon the Solicitor General, Department of Justice, Washington, D.C. 20530, upon Robert Dondero, Assistant United States Attorney, as counsel of record for the United States of America, 450 Golden Gate Avenue, 16th Floor, San Francisco, California 94012 on December 3, 1990. I further certify that all parties required to be served have been served.



Bradley R. Stark, Esq.

APPENDIX A

UNITED STATES of America,

Plaintiff-Appellee,

v.

Kuldip Singh MUNDI,

Defendant-Appellant.

No. 87-1289

United States Court of Appeals,
Ninth Circuit.

Argued April 6, 1989.
Submitted June 6, 1989.
Decided Dec. 21, 1989.

Defendant was convicted in the United States District Court for the Northern District of California, Robert H. Schnacke, J., of wire fraud, selling stolen property, and conspiracy, and he appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) the jury instructions on wire fraud did not violate *McNally*; (2) the instructions did not amount to a partial directed verdict in favor of the Government; (3) evidence of other travel agencies involved in an alleged scheme to exchange airline tickets was admissible over an objection that the evidence was other crimes evidence; (4) the evidence supported the wire fraud conviction; and (5) the conviction for selling stolen property was reversible error where there was confusion about whether the defendant had been prosecuted for selling stolen property or for interstate transportation of stolen property.

Affirmed in part, reversed in part.

1. Telecommunications –363

Instructions in wire fraud prosecution made it clear that jury could not return verdict of guilty unless it found that defendant had acted to carry out scheme with intention of obtaining money or property, and thus, instructions did not violate *McNally*, even if there was some language that might have implied that conviction could be returned even if jury found that defendant's scheme had not been intended to cause anyone deprivation of money or property.

2. Criminal Law –763(7)

Instructions in wire fraud prosecution did not amount to partial directed verdict in favor of Government, despite defendant's contention that instruction stated that disruption of system through which airlines exchanges tickets automatically constituted fraud; district court clearly instructed jury that facts were for jury to decide.

3. Criminal Law –369.2(3)

Evidence of other travel agencies allegedly involved in scheme to exchange airline tickets was admissible, over objection that it was other crimes evidence, even though other travel agencies were not named in wire fraud indictment, as being "inextricably intertwined" with and "part of the same transaction" as conduct alleged in indictment. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

4. Telecommunications –363

Evidence was sufficient to demonstrate that

defendant intended to defraud airlines by engaging in ticket exchange scheme and, thus, sustained wire fraud conviction, even though defendant claimed that he had relied on advice of lawyer that his scheme was legal.

5. Criminal Law –995(3)

Conviction for selling stolen goods that had crossed state line was reversible error where caption of indictment referred to statute prohibiting interstate transportation of stolen property, defense proposed jury instructions on interstate transportation statute, and judgment itself identified offense as interstate transportation of stolen property. 18 U.S.C.A. §§ 2314, 2315; Fed.Rules Cr.Proc.Rule 36, 18 U.S.C.A.

Michael T. Kenney, Albert A. Newton, Santa Ana, Cal., for defendant-appellant.

Joseph P. Russoniello, Sanford Svetcov, Dept. of Justice, U.S. Atty., San Francisco, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California.

Before POOLE, REINHARDT and O'SCANNLAIN, Circuit Judges.

REINHARDT, Circuit Judge:

Kuldip Singh Mundi appeals his convictions for twenty-five counts of wire fraud, one count of selling stolen property and one count of conspiracy. The charges stem from a complex scheme, allegedly devised and executed by Mundi, in which he performed unauthorized

and fraudulent exchanges of airline tickets purchased in Nigeria for tickets on airlines operating in the United States. He raises a number of objections to the proceedings below. We have considered each and affirm his convictions, except as to one count.[1]

A. The *McNally* Claim

[1] Mundi claims first that the district court's instructions to the jury on the wire fraud counts failed to conform to the standard established by *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), and *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 2875, 97 L.Ed. 2d 275 (1987).[1] We review a claim of error in a jury instruction by looking to "the adequacy of the entire charge ... in the context of the whole trial." *United States v. Marabelles*, 724 F.2d 1374, 1382 (9th Cir.1984). We review de novo the question whether the instructions correctly explained the law and the elements of fraud. *United States v. Stenberg*, 803 F.2d 422, 433 (9th Cir.1987).

Considering the fraud instructions as a whole, we note first that there is some language which might imply that the jury could convict Mundi even if it found that his scheme had not been intended to cause anyone a deprivation of money or property. A conviction based upon such a finding would violate *McNally*. *See* 488 U.S. at 356, 107 S.Ct. at 2879. We are aware that the district judge said at one point that a "scheme to defraud *normally* contemplates a disadvantage to the defrauded person" and that the injury in this case "could be" the airlines' loss of payment or delay in payment on the tickets Mundi

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[1] Although *McNally* was decided after Mundi was convicted, we are bound by its construction of the federal wire fraud statute. *See United States v. Hilling*, 863 F.2d 677, 678 (9th Cir. 1988).

exchanged. Nonetheless, we conclude that the entire instruction rendered it impossible for the jury to convict Mundi without actually finding that he had deprived the airlines of money or property. The court's description of the elements of fraud left no doubt that a verdict of guilty could not be returned unless the jury found that Mundi had "acted to carry out the scheme with the intention of obtaining money or property by carrying out the scheme to defraud."

Moreover, in analyzing a claim of error in jury instructions, we may look beyond the instructions themselves and examine the indictment and the entire trial in context. *Marabelles*, 724 F.2d at 1382; *see also United States v. Park*, 421 U.S. 658, 674-75, 95 S.Ct. 1903, 1912-13, 44 L.Ed.2d 489 (1975); *United States v. Perholtz*, 836 F.2d 554, 559 (D.C.Cir.1987). In this case, it is clear from the indictment, as well as from the manner in which the purportedly fraudulent scheme was presented at trial, that the scheme alleged was that Mundi defrauded the airlines of "money or property." The indictment alleged, for example that Mundi "did devise and intend to devise a scheme and artifice to defraud and deceive in the obtaining of money or things of value[2] by means of false and fraudulent pretenses ...," that he fraudulently obtained air coupons, and that he exchanged altered multiple-page air coupons or invalid coupons for values greater than they were worth.

Furthermore, testimony of airline officials described with some detail how such exchange schemes as those

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[2] Note that the Supreme Court has read the mail fraud statute's use of defraud as signifying "the deprivation of something of value by trick, deceit, chicane or overreaching." *Carpenter* 108 S.Ct. 316, at 321 (citing *McNally*). Thus, the absence of the word "property" is immaterial.

Mundi was accused of operating deprive the airlines of money and property. These officials identified several means by which the airlines are injured in these schemes—through delayed payments, overpayments to other airlines, underpayments from other airlines, and negotiated settlements with other airlines that result in a particular airline receiving less than the full value of the tickets issued by the travel agencies participating in these schemes.

These facts, coupled with the fact that the court's instructions specifically required the jury to find that Mundi had deprived someone of money or property, are sufficient to cause us to reject the argument that the fraud instructions were insufficient under *McNally*.

B. The "Directed Verdict" Instruction

[2] Mundi next challenges a portion of the trial court's instruction in which, after describing the system through which the airlines exchange tickets, the court allegedly stated that disruption of the system automatically constituted fraud. Mundi claims this instruction amounted to a partial directed verdict in favor of the government, a practice proscribed in criminal prosecutions. *See United States v. Goetz*, 746 F.2d 705, 708 (11th Cir.1984).

Mundi's argument is incorrect. Applying the type of review we described *supra* in Part A to the relevant portions of the court's instructions, we conclude that the district judge did not take any part of the case from the jury. First, the court instructed the jurors in general terms that it was their views and their "recollection of the evidence" that mattered, not the court's own. Second and more important, upon Mundi's objection to the portion of the instruction upon which he now relies for his claim of

error, the court clarified its instruction, telling the jurors specifically that "all the facts [we]re for [them] to decide," and that they had to determine for themselves "what the scheme was, if there was any scheme; what the advantages [to Mundi] would be on the one hand and the disadvantages [to the airlines] on the other." Finally, the court gave extensive and explicit instructions concerning Mundi's defense theories.

It is thus clear from the record that the court did not direct a verdict in favor of the government, in whole or in part, and indeed carefully preserved all factual issues for determination by the proper finder of fact, in this case, the jury.

C. The Admission of Evidence of Other Schemes

[3] Mundi's original indictment alleged that his scheme involved eleven travel agencies; the superseding indictment under which he was ultimately tried named only one agency specifically although, as the government correctly notes, it did speak of Mundi's scheme in terms that indicated a far wider scope of operations. At Mundi's trial, and over his objection, the court allowed testimony which named several travel agencies not specifically mentioned in the indictment, and which discussed Mundi's scheme with respect to them. Mundi now claims that the court erred in admitting this evidence, inasmuch as the evidence was irrelevant and prejudicial, and deprived him of his "substantial right to be tried only on charges presented in an indictment returned by a grand jury." *United States v. Miller,* 471 U.S. 130, 140, 105 S.Ct. 1811,

1817, 85 L.Ed.2d 99 (1985).[3]

We review de novo the question whether the evidence concerning the travel agencies not specifically named in the indictment was "other crimes" evidence beyond the scope of the indictment and admissible only in limited circumstances under Fed.R.Evid. 404(b). *See United States v. Soliman,* 813 F.2d 277, 278 (9th Cir.1987). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Id.*

We agree with the government that the trial court did not err in admitting this evidence. Mundi himself admitted that his scheme involved a number of travel agencies; similarly, his indictment alleged that he exchanged tickets with "travel agents in the United States." In light of these facts, we think the government correct in its assertion that the evidence it presented was "inextricably intertwined" with, and "part of the same transaction" as, the conduct alleged in the indictment. *See Soliman,* 813 F.2d at 279 ("[e]vidence should not be treated as 'other crimes' evidence when 'the evidence concerning the ["other"] act and the evidence concerning the crime charged are inextricably intertwined'") (quoting *United States v. Aleman,* 592 F.2d 881, 885 (5th Cir.1979)). Alternatively, since Mundi's defense largely concerned his lack of criminal intent, the evidence was admissible to show intent under Rule 404(b). *See Huddleston v. United States,* 485 U.S. 681, 108 S.Ct. 1496, 1499, 99 L.Ed. 2d 771 (1988); *United States v. Faust,* 850 F.2d 575, 584-85 (9th Cir.1988); *Soliman,* 813 F.2d at 279.

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[3] Mundi's *Miller* claim does not merit more than summary treatment. Our review of the record has revealed no evidence that the limited references to other agencies that Mundi mentions amounted to his being "tried on other charges." We thus treat his claim as essentially an evidentiary one.

The district court did not abuse its discretion in admitting the evidence concerning other travel agencies.

D. The Sufficiency of the Evidence

[4] Mundi's final contentions on appeal concern the sufficiency of the evidence on which the jury convicted him. Mundi twice moved for judgments of acquittal under Fed.R.Crim.P. 29, alleging the government's evidence to be insufficient. Both motions were denied. We review the denial of the Rule 29 motions and Mundi's challenge to the sufficiency of the evidence under the same standard, assessing whether, when viewed in the light most favorable to the government, the evidence adduced at trial was sufficient for a rational jury to find Mundi guilty beyond a reasonable doubt. *United States v. Bonnanno,* 852 F.2d 434,440 (9th Cir. 1988). Having done so, we conclude that the trial court rightly denied Mundi's Rule 29 motions; the evidence was sufficient to sustain Mundi's convictions. We deal with his two principal contentions in turn.

Mundi argues that his fraud convictions must be overturned because there was insufficient evidence of his criminal intent and because Mundi claimed that he had relied on the advice of a lawyer that his scheme was legal. No lawyer testified on Mundi's behalf to corroborate his story. It was a story the jury was not required to believe. In any case, the critical inquiry here is not whether the evidence was conflicting, but whether the government offered evidence from which a rational jury could conclude beyond a reasonable doubt that Mundi intended to commit the fraud. *See Bonnanno,* 852 F.2d at 440. Mundi admitted that his lawyer told him that, if he consulted the relevant airline ticketing entities, they would tell him his

scheme violated their rules. Furthermore, the government elicited testimony from a travel agency employee who cooperated in the government's investigation that Mundi had advised him to leave the country if the scheme were uncovered. Based on these facts and the entire record before us, we conclude that the government amply carried its burden of demonstrating Mundi's intent to work a fraud.

E. Count 26

[5] Mundi argues that his conviction on Count 26 of the indictment, which charged a single count of selling stolen goods in violation of 18 U.S.C. § 2315, should be reversed because of trial errors, vagueness and confusion in the jury instructions, and errors in the entry of judgment. We agree. The confusion surrounding this count is sufficient to leave us in doubt whether the jury could have properly and clearly considered the evidence and elements of the offense in convicting Mundi.

Count 26 of Mundi's indictment clearly refers to § 2315. However, the caption of the indictment refers in relevant part to 18 U.S.C. § 2314, a statute which covers interstate transportation of stolen property, but lacks the so-called "barter or sale" requirement of § 2315.[4] There is

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[4] 18 U.S.C. § 2314 makes it a crime for an individual to "transport[], transmit[], or transfer[] in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5000 or more, knowing the same to have been stolen, converted or taken by fraud."

18 U.S.C. § 2315 applies to the individual who "receives, possesses, conceals, barters, sells, or disposes of any goods, wares, merchandise, securities or money of the value of $5000 or more . . . , which have crossed a State or United States boundary after being stolen,

no mention in the caption of § 2315. Moreover, at trial, the government referred to § 2314 in prosecuting Count 26 and in colloquies with the district judge on that count. And the defense, which proposed jury instructions for § 2314, contributed to the confusion. The judgment on Count 26 itself identifies § 2314 as the offense of which Mundi was found guilty, an error the government claims was merely clerical and could be remedied by a motion under Rule 36, Fed. R. Crim. P. But the confusion was obviously more than clerical; the government even briefed the wrong statute in its brief on appeal.[5] With so many errors occurring, we cannot assume that the error in the judgment was merely technical or clerical, and we cannot say with the requisite degree of confidence that the errors did not mislead and confuse the jury as to the charge against Mundi or the elements of the offense. Certainly, everyone else concerned was confused at one time or another. It is not unreasonable, therefore, to conclude that the jury may have been as well.[6] Accordingly, we must reverse Mundi's conviction on Count 26.

For the above reasons Mundi's conviction is

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unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken."

[5] The government, in a letter to the court after our request for supplemental briefing, claimed that it had merely made some "mistaken references to § 2314 in [its] brief." This characterization of the brief is disingenuous, for the text of the brief clearly demonstrates that — at least at the time the brief was written — the government actually believed Mundi had been convicted of interstate transportation, rather than sale, of stolen property.

[6] It is possible that the jury convicted Mundi of transporting stolen goods although he was charged with selling or bartering such goods; or it could have convicted him of selling or bartering stolen goods without fully understanding what the elements of that offense involved.

affirmed on all counts other than Count 26 and reversed on the latter count.

AFFIRMED IN PART, REVERSED IN PART

APPENDIX B

[FILED MAR -1 1990]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 87-1289

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KULDIP SINGH MUNDI,

Defendant-Appellant.

ORDER

Appeal from the United States District Court for the Northern District of California
Robert H. Schnacke, District Judge, Presiding

Before: POOLE, REINHARDT, and O'SCANNLAIN, Circuit Judges

Appellant's request for a supplementary hearing on the merits is denied. His request for appointment of new counsel is also denied.

APPENDIX C

[FILED SEP -5 1990]

NOT FOR PUBLICATION

UNTIED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 87-1289

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KULDIP SINGH MUNDI,

Defendant-Appellant.

ORDER

Appeal from the United States District Court for the Northern District of California
Robert H. Schnacke, District Judge, Presiding

Before: POOLE, REINHARDT, and O'SCANNLAIN, Circuit Judges

Appellee's petition for rehearing is denied.

(2)

No. 90-885

In the Supreme Court of the United States

OCTOBER TERM, 1990

KULDIP SINGH MUNDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence at trial was sufficient to sustain petitioner's convictions on 25 counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. 371.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-885

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 16-27) is reported at 892 F.2d 817.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1989. A petition for rehearing was denied on September 5, 1990. Pet. App. 29. The petition for a writ of certiorari was filed on December 4, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on 25 counts of wire fraud, in violation of 18 U.S.C.

1343; one count of selling stolen goods in interstate commerce, in violation of 18 U.S.C. 2315; and one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371. He was sentenced to seven years' imprisonment and fined $265,000. The court of appeals reversed petitioner's conviction for selling stolen property in interstate commerce, but affirmed on all other counts. Pet. App. 16-27. As a result of the reversal, petitioner's sentence was reduced to five years' imprisonment and a fine of $260,000. *Ibid.*[1]

1. The evidence at trial showed that petitioner and his co-defendants engaged in a scheme to defraud airline carriers of air fares through the exchange of airline tickets purchased in Nigeria for tickets on airline carriers operating in the United States.

a. Because of a severe balance of payments problem, the Nigerian government prohibited any person or business from removing currency from Nigeria without government approval. To evade those restrictions, some Nigerian residents would buy large blocks of airline tickets from several of the 22 airline carriers operating in Nigeria. They would then arrange to transport the tickets out of Nigeria through an intermediary, who would exchange them for new tickets issued by a travel agent on airlines operating in the United States. After selling the new tickets at a discount to U.S. customers, the intermediary would keep an agreed percentage for himself and the travel agent, and pay the remainder to the original Nigerian ticket holder. Gov't C.A. Br. 5-6.

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[1] On the count charging him with selling stolen goods, petitioner was fined $5,000 and sentenced to seven years' imprisonment, to be served concurrently with terms of five years' imprisonment imposed on the other counts. C.A. E.R. 42.

The airline carriers in the United States on which new tickets were issued pursuant to the above scheme stood to suffer substantial losses. Tickets purchased in Nigeria normally included a multi-leg trip, originating in Nigeria, with separate ticket coupons for each leg of the trip with other carriers. Payment for those tickets was made in local devalued currency to the carrier that sold the ticket in Nigeria; the other carriers would not receive payment until they submitted the ticket coupons to the carrier that sold the ticket at the end of each month after the later legs of the trip were flown. However, because the Nigerian tickets were usually endorsed "non-refundable" or "non-transferable" or "not valid unless travel commences in Nigeria," the Nigerian government would not authorize payment by the Nigerian carrier on exchanged tickets believed to have been exchanged improperly. Consequently, the U.S. airline carrier might not receive payment for its newly issued ticket at all or might receive only a reduced payment after months of negotiations. Gov't C.A. Br. 6-8, 22-24.

b. Petitioner acted as a ticket exchange intermediary. He arranged to exchange some Nigerian tickets through Targa Travel Agency (Targa) in Hayward, California. Targa was a member of the International Airlines Travel Agent Network (IATAN), a trade association of 66 affiliated airlines that regulates travel agents in the United States who are approved to write tickets for the airlines. The issuance of tickets by IATAN members and the disbursements of proceeds from ticket sales to the respective airlines are processed through the Airline Reporting Corporation (ARC). By written agreement, Targa was bound to sell airline tickets pursuant to ARC regulations, which prohibited the exchange of any tickets without the authority of the carrier issuing the new ticket and the carrier that had issued the original ticket. The ARC regulations also required that all ticket sales be reported to ARC weekly, and the airlines were to be paid

within one week of the purchase of a ticket, whether by check, cash, credit card, or authorized exchange. Gov't C.A. Br. 3-5, 8-9.

On December 6, 1986, two of petitioner's associates delivered 200 Nigerian tickets to Targa's offices. When petitioner arrived, he told Targa's manager, who unbeknownst to petitioner had agreed to cooperate with the FBI in an investigation of petitioner's activities, that the Nigerian tickets had a face value of $1.3 million. He offered to pay the manager 10 percent of the value of the tickets, with a $20,000 advance in cashier's checks, to exchange the tickets. Petitioner warned the manager that he would lose his license if ARC discovered that he was exchanging tickets in violation of ARC regulations. Petitioner had previously suggested that the manager should leave the country if the scheme were discovered by ARC and had urged the manager to delay sending weekly sales reports to ARC and to avoid referring to the exchanged tickets when such reports were sent. Gov't C.A. Br. 13-14.

After the manager agreed to the ticket exchange, petitioner's associates began issuing new tickets on Targa's computer showing "cash" rather than "exchange" as the form of payment. Gov't C.A. Br. 14. Shortly thereafter, petitioner and his associates were arrested. During the ensuing search, the FBI seized more than 200 Nigerian tickets, as well as the newly generated tickets issued by the Targa computer.[2] Gov't C.A. Br. 14-15.

2. The court of appeals affirmed petitioner's wire fraud and conspiracy convictions. Pet. App. 16-25. It first concluded that the district court properly instructed the jury on the wire fraud counts. *Id.* at 19-22. It also concluded

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[2] Twenty-five of the seized tickets formed the basis for the 25 wire fraud counts charged in the indictment. Gov't C.A. Br. 15; Superseding Indictment 9-10.

that evidence that petitioner's scheme involved a number of travel agencies was properly admitted at trial in connection with the wire fraud counts. *Id.* at 22-23. Finally, the court rejected petitioner's contention that the evidence at trial was insufficient to establish his criminal intent. *Id.* at 24-25.

The court of appeals reversed petitioner's conviction for selling stolen goods in interstate commerce. It concluded that confusion at trial over the precise nature of the charge against petitioner on that count required that the conviction on that count be vacated. Pet. App. 25-26.

ARGUMENT

Petitioner contends that the evidence at trial was insufficient to sustain his wire fraud convictions because it established an intentional breach of contract, not criminal fraud. Pet. 9-13.

1. Petitioner claimed before the court of appeals that there was insufficient evidence to convict him of wire fraud because he had relied on the advice of counsel and therefore lacked the necessary intent. He did not, however, assert what appears to be his present claim—that the evidence proved merely a breach of contract and was insufficient as a matter of law to establish fraud. See Pet. C.A. Br. 43-50; Pet. C.A. Reply Br. 20-21. Further review to consider the question presented by petitioner is therefore not warranted. See, *e.g.*, *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984).

2. In any event, petitioner's claim has no merit. It appears to rest on the proposition that petitioner could not be convicted of wire fraud if his scheme also resulted in an intentional breach of contract by the travel agency. To be sure, petitioner's ticket exchange scheme could succeed only if the travel agency violated the IATAN and ARC regula-

tions requiring the authorization of the airline carrier issuing the new ticket. The issuance of the new tickets without that authorization, however, was not merely a violation of a contractual relationship. It was also carefully calculated to deceive the U.S. airline carriers into believing that they had been paid or would receive payment for the new tickets. Petitioner's conduct therefore clearly amounted to a criminal fraud, for the purpose of the scheme was to enrich himself through the sale of the improperly exchanged tickets at the expense of the U.S. airline carriers, who were unable to obtain full repayment of the air fares from the carriers that issued the original Nigerian tickets.

3. Contrary to petitioner's contention (Pet. 11-13), his wire fraud convictions in this case are not inconsistent with *McEvoy Travel Bureau, Inc.* v. *Heritage Travel, Inc.*, 904 F.2d 786 (1st Cir.), cert. denied, 111 S. Ct. 536 (1990). In that case, Norton Company, which had used McEvoy Travel as its exclusive travel agent, awarded an exclusive contract to Heritage Travel and terminated McEvoy's services. McEvoy then brought a civil RICO action alleging that Norton, Heritage, and Heritage's president had fraudulently ousted McEvoy as Norton's exclusive agent through a pattern of racketeering activity consisting of numerous acts of mail and wire fraud. 904 F.2d at 787-788. In pertinent part, McEvoy alleged that, in an attempt to gain the required approval by two airline industry regulatory associations for the Norton-Heritage arrangement, Norton and Heritage had submitted a false contract concealing illegal payments and rebates. *Id.* at 789.

The court of appeals in *McEvoy* affirmed the dismissal of the complaint for failure to state a claim. In the passage relied upon by petitioner (Pet. 12), the court stated that "the deceptive submission of the phoney contract to the two associations, so that Heritage would be allowed to serve as Norton's agent, was [not] a scheme to defraud McEvoy

within the meaning of the mail and wire fraud statutes." 904 F.2d at 793. Because "securing the regulatory associations' approval by devious means * * * did not mislead, trick or deceive McEvoy," the court explained, there was "no causal connection, in the ordinary sense, between the fraudulent submission to [the two regulatory associations] and McEvoy's injury." *Ibid.* In contrast, petitioner's attempt to violate the ARC rules by exchanging tickets without securing authorization both deceived and injured the ARC-member airlines that were victims of petitioner's scheme.[3]

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[3] Petitioner claims (Pet. 7-8, 13) that his wire fraud convictions are inconsistent with *Florida* v. *Mundi*, 558 So. 2d 503 (Dist. Ct. App. 1990), in which an intermediate state appellate court dismissed charges against petitioner involving another travel agency in Florida. Even if there were such an inconsistency, further review would not be warranted to resolve a conflict between a federal court of appeals and an intermediate state appellate court. See Sup. Ct. R. 10.1. In any event, there is no inconsistency between the decision of the Ninth Circuit in this case applying 18 U.S.C. 1343 to petitioner's scheme and a Florida decision applying certain state criminal statutes to a similar scheme. Finally, it is far from clear that the Florida court would have disagreed with the Ninth Circuit. The court's entire opinion consisted of the following: "Affirmed. *See and compare Singh* v. *Florida*, 545 So. 2d 517 (Fla. 3d DCA 1989)." 558 So. 2d at 504. The court in *Singh* v. *Florida* had held that two defendants' convictions under state law for organized fraud, first-degree grand theft, and dealing in stolen property must be reversed "as no showing was ever made below of an organized fraud, a theft, or a dealing in stolen property as charged in the information." 545 So. 2d at 518.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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